(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)
Glidden Company and Sherwin-Williams Company	) CERCLA § 106(b)) Petition Nos. 02-01 & 02-02

[Decided December 17, 2002]

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

GLIDDEN COMPANY AND
SHERWIN-WILLIAMS COMPANY

CERCLA § 106 (b) Petition Nos. 02-01 & 02-02

FINAL DECISION

Decided December 17, 2002

Syllabus

The Glidden Company and the Sherwin-Williams Company ("Petitioners") filed Petitions seeking reimbursement of costs incurred in performing work under a unilateral administrative order ("UAO") issued by U.S. EPA Region V related to the Cross Brothers Pail Recycling Site in Kankakee County, Illinois ("the Site"). In response to the Petitions, the Region filed a motion seeking dismissal of the petitions on the ground that Petitioners have not completed the actions required under the UAO, a statutory prerequisite to reimbursement under section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act.

The UAO in question required Petitioners to undertake certain remedial actions at the Site to abate what the Region considered to be an imminent and substantial endangerment to the public health or the environment presented by the release or potential release of hazardous substances. Between 1961 and 1980, the owners of the Site operated a drum reclamation facility, as a result of which both the soil and the underlying groundwater at the facility became contaminated with hazardous substances. Under the UAO, Petitioners were required, among other things, to install and maintain a groundwater collection and treatment system designed to capture and remove contaminants from the groundwater; install and maintain a soil flushing system for a portion of the Site and a vegetative cover for the remainder of the Site; and monitor groundwater until such time as analysis consistently indicated that cleanup objectives had been met. Once it is established that clean up objectives have been met, the UAO would then require installation of a vegetative cover over the part of the Site used for soil flushing operations. The system is currently in the second year of a trial shutdown period – proposed by the Petitioners' contractor to last five years – to confirm that contaminants remain at levels below EPA requirements when the system is not operating. Accordingly, neither the ground water monitoring required by the UAO, nor the installation of a vegetative cover over the soil flushing portion of the Site, had been completed prior to the filing of the Petitions.

Although Petitioners have not completed all of the tasks contemplated by the UAO, they assert that they have nevertheless met all prerequisites for filing a petition under EPA Guidance and EAB and court precedent.

Held: Because Petitioners have failed to establish that they have completed the actions required by the UAO, the Petitions are dismissed without prejudice as premature. This is not a case where the work at the Site can be bifurcated between the work that has been done and the work which has not; nor is it a case where the Board could find that the work is complete enough to satisfy the statute's requirement of completeness.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

On June 25, and 28, 2002, respectively, the Environmental Appeals Board (the "Board") received petitions for reimbursement from the Glidden Company and the Sherwin-Williams Company (collectively "Petitioners"), pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b). *See* The Sherwin-Williams Company Section 106(b) Petition for Reimbursement ("Petition") (June 28, 2002).[1] Petitioners seek reimbursement of costs incurred for performing work under a unilateral administrative order ("UAO") issued by U.S. EPA Region V on February 8, 1990, related to the Cross Brothers Pail Recycling Site located in Pembroke Township, Kankakee County, Illinois.

In accordance with this Board's practice in CERCLA 106(b) reimbursement petitions, the Board requested that EPA Region V ("Region V") prepare responses to the petitions for reimbursement. Acting on this request, on August 7, 2002, Region V filed with the Board its "Motion that Petitions for Reimbursement Be Dismissed Without

[1] The Petition for Reimbursement filed by the Glidden Company states that it adopts and incorporates the Petition filed by the Sherwin-Williams Company. Accordingly, for purposes of simplicity, this decision will cite only to the petition filed by Sherwin-Williams.

Regard to the Petitions' Merits and, in the Alternative, for Additional Time to Respond on the Merits." In its motion, Region V asks, *inter alia*, that the Board dismiss the petitions on the ground that Petitioners have not completed the required action under the UAO, a prerequisite for reimbursement under CERCLA. Region V's Motion at 1.

By order dated August 8, 2002, the Board requested that Petitioners respond to Region V's Motion. Petitioners filed responses on September 6, 2002.

For the reasons stated below, the petitions for reimbursement are dismissed without prejudice as premature.

I. *BACKGROUND*

A. *Site History Leading up to the UAO*

The circumstances giving rise to the UAO in question do not appear to be in dispute. Between 1961 and 1980, James and Abner Cross operated a pail and drum reclamation facility known as the Cross Brothers Pail Recycling site ("the Site") on a twenty-acre parcel of land in a semi-residential area. The reclamation process utilized at the Site allegedly consisted of draining the contents of reclaimable pails and drums onto the ground, rinsing the emptied containers with solvent – the rinsate from which was likewise poured onto the ground, and then reconditioning and painting the containers for resale. UAO at 3-4 (Exhibit 1 to Sherwin-Williams Petition).[2] As a result of these operations, both the soil and the underlying groundwater at the facility became contaminated with numerous hazardous substances,[3] including

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[2] Hereinafter, exhibits accompanying the Petition will be referred as "P.Ex." along with the number of the exhibit.

[3] The term "hazardous substance" includes any substance identified as a hazardous substance under CERCLA § 101(14) and any other substance identified as a hazardous substance by Agency regulation. *See* CERCLA § 102, 42 U.S.C. § 9602. A (continued...)

benzene, ethyl benzene, polychlorinated biphenyls, toluene, and vinyl chloride. *Id*. at 5.

In June of 1980, the site was inspected by the Illinois Environmental Protection Agency ("IEPA"). According to the UAO, that inspection revealed that "the reclamation operation had resulted in a layer of waste residue up to 6 inches thick covering approximately 10 acres of the site." *Id.* at 4. Reclamation operations at the Site concluded shortly thereafter, when the Illinois Attorney General's Office obtained an order in State court requiring the Site to close down. *Id.*

In September of 1983, the Site was listed on the National Priorities List ("NPL"), prioritizing the site for response action under CERCLA. *Id.* In the wake of the NPL listing, IEPA performed a Remedial Investigation and Feasibility Study at the Site, based upon which U.S. EPA, with IEPA's concurrence, issued a Record of Decision ("ROD") in early 1985 establishing an initial course for remedial action at the Site. *Id.* The 1985 ROD contemplated a preliminary phase of remedial action, focused primarily on excavation and removal of contaminated surface soils and associated debris, to be followed by further study of the groundwater contamination at and around the Site. The preliminary phase of remedial action was undertaken by IEPA and concluded in 1985.

After several years of additional study of the hydrological conditions at the Site, a second ROD was issued in September 1989 calling for a number of additional actions to address groundwater contamination at and around the Site. The ROD included the following "major" components:

> Re-sampling of the localized PCB soil area to identify the existence of PCBs.

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[3](...continued)
list of substances EPA has designated as hazardous substances appears at 40 C.F.R. § 302.4. There is no dispute in the present case that groundwater and soil at the Site contained hazardous substances.

> If identified, remove the localized PCB-contaminated soil area and incinerate the soils at a TSCA-approved incinerator.
>
> Install and maintain a groundwater collection system capable of capturing the groundwater contaminant plume.
>
> Install and maintain an on-site groundwater treatment facility to remove contaminants from the collected groundwater.
>
> Install and maintain a soil flushing system for the 3.5 acres of contaminated soil within the disposal area.
>
> Install and maintain a 6 inch vegetative cover over that portion of the disposal area not subject to the soil flushing operation.
>
> Monitor the groundwater collection/treatment system and groundwater contaminant plume during the groundwater remediation activities.
>
> Install and maintain a 6 inch vegetative cover over the 3.5 acre area subject to soil flushing upon termination of the soil flushing operation.
>
> Install and maintain a fence around the site during remediation activities.

Id. at 6-7.

For purposes of the dispute at hand, it bears reinforcing that the 1989 ROD apparently had a dual focus – (1) remediating existing groundwater contamination; and (2) preventing additional contamination of groundwater as a result of leaching from remaining contaminated soil. *Id*.; ROD Summary at 4 (P.Ex. 1). The first objective was to be

addressed through a system designed to pump and treat already contaminated groundwater. The second objective was to be addressed by capping less contaminated surface areas of the Site with a 6-inch vegetative cover, and flushing the most contaminated area of the Site (3.5 acres) with water, which would then be captured and treated through the groundwater pump and treat system. Once there was an indication that soil flushing of the most contaminated soils was no longer needed (i.e., because the contamination in the soil had been adequately flushed through and no longer posed a threat to the groundwater), the remaining 3.5 acres of the Site would be capped with a 6-inch vegetative cover to stabilize the soils at the Site and ensure that soils will not be carried onto neighboring properties by the wind. *See* Responsiveness Summary at 4 (P.Ex. 1).

B. *The UAO*

The UAO underlying the Petition was issued on February 8, 1990, alleging that the Site presented an imminent and substantial endangerment to the public health or welfare or the environment presented by the release or potential release of hazardous substances, and requiring Petitioners, essentially, to implement the 1989 ROD (Appendix I to the UAO) and the Scope of Work (Appendix IV to UAO), and to develop and, once approved, fully implement a Remedial Design/Remedial Action Work Plan. *Id*. at 8. The ROD estimated that the required actions would take a total of fifteen years to complete, making 2005 the year of projected completion.

On December 22, 2000, the Region approved a monitoring plan, proposed by Petitioners, for a trial shutdown of the treatment and recovery system. *See* Letter from Steven J. Padovani, Remedial Project Manager, U.S. EPA Region V, to Bob Haag, Haag Environmental Company (Exhibit 4 to Region's Motion to Dismiss (hereinafter cited as "R.Ex.")). The purpose of the trial shutdown period "is to confirm that the contaminants will remain at levels below USEPA requirements when the recovery and treatment system is not operating." Monitoring Plan for Trial Shutdown of Recovery and Treatment System Cross Brothers Pail Recycling Site Pembroke Township, Illinois ("Monitoring Plan") at 1

(attachment to R.Ex.4).[4] As reflected in the Monitoring Plan, the trial shutdown and monitoring phase was proposed to last approximately five years. *See id.* at 11-12 (specifying wells to be monitored in years 1 and 2 and years 3-5). The trial shutdown is currently in its second year. The Plan provides for a progressive reduction in the list of compounds requiring monitoring and in the frequency of monitoring, as long as monitoring results demonstrate that contaminant levels remain at levels below ROD requirements.

The Monitoring Plan includes a termination mechanism which provides that, when supported by the data:

> [Petitioners] will submit a letter petitioning USEPA to allow all site operations to cease, and to initiate closure steps anticipated by the ROD and the [UAO].
>
> ****
>
> After USEPA has approved the methods proposed in the petition for closure, [Petitioners] will prepare and submit a Draft Closure Report, which will document the findings obtained by evaluating the data collected during the trial shutdown period. This report will also document the steps to be taken for system decommissioning and final site grading. After USEPA has approved the Draft Closure Report, [Petitioners] will execute the system decommissioning and site grading

[4] The Monitoring Plan, prepared by Haag Environmental Company, contractor for Petitioners, was incorporated into Petitioners' approved Quality Assurance Project Plan ("QAPP"), also prepared by Haag Environmental. *See* R.Ex. 5, Appendix F. Under the UAO, Petitioners were required to prepare a QAPP prior to commencement of any sampling or analysis. UAO at 8, 10. The QAPP describes the data collection and sampling procedures to be used at the Site. Pursuant to the UAO, once approved by EPA, the QAPP, including the Monitoring Plan, became an enforceable component of the UAO. *Id*. at 8-9.

> steps. The final status of the site will be documented in a report revision termed the Final Closure Report.

Monitoring Plan at 19. As far as we can determine from the record before us, Petitioners have not complied with the closure requirements of the Monitoring Plan. That is, Petitioners have not submitted a petition for permission to cease operations, nor have they initiated closure steps anticipated by the UAO.

Thus, as envisioned by the UAO and the Monitoring Plan, the remedial actions required by the UAO would be complete upon the determination after the trial shutdown period that no further pumping and treating is needed, giving rise to the culminating step of capping the soil flushing area of the site with a vegetative cover. The Monitoring Plan, prepared by Petitioners' own contractor, anticipated that this process would take approximately 5 years. Further, the Quality Assurance Project Plan ("QAPP"), prepared by Haag Environmental Company, contractor for Petitioners,[5] anticipated that the closure petition would be submitted to EPA at the end of 2005 and that a Final Closure Report would be completed in late 2006. QAPP at 16 (Figure 1-1, Project Schedule for Cross Brothers Site).

Notably, like the Monitoring Plan, the UAO itself includes a termination mechanism for establishing that the work required by the UAO has been completed. Section XVII(B) of the UAO provides, *inter alia*:

> When the Respondents determine that they have completed the Work, they shall submit to U.S. EPA and IEPA a Notification of Completion. Upon receipt of the such Notification, U.S. EPA and IEPA shall schedule final inspections and close out activities * * * .
>
> ****

[5] *See supra* note 4.

> U.S. EPA shall issue a Certification of Completion upon its determination that the Respondents have satisfactorily completed the work and have achieved standards of performance required under this Administrative Order.

Id. at 15-16.

C. *Status of UAO Implementation*

It is undisputed that Petitioners have complied with many of the requirements of the UAO and the 1989 ROD. In particular, they have removed and incinerated PCB-contaminated soil, installed and maintained a groundwater collection and treatment system, and maintained a soil flushing system.

As indicated above, however, the groundwater collection and treatment system required by the UAO has not been definitively concluded, but rather is currently in a trial shutdown phase. Under the Monitoring Plan and QAPP this trial shutdown period is expected to continue until late 2005, with a Final Closure Report to be submitted in 2006. Additionally, because the trial shutdown phase has not yet been completed, the vegetative cap for the 3.5 acre soil flushing area has not yet been constructed.

Petitioners have not submitted a Notification of Completion or otherwise invoked the mechanism for completion assessment set forth in either the above-cited portions of the Monitoring Plan or in Section XVII(B) of the UAO.

D. *The Petition* [6]

As stated above, Petitioners seek reimbursement of costs, plus interest, incurred in complying with the UAO. The Petition states, in

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[6] *See supra* note 1.

part, that the Region's decisions in selecting the response actions were arbitrary and capricious because: (1) Petitioners were "required to construct and operate a groundwater treatment system that was unnecessary," and (2) "even if [Petitioners] were determined to be [liable parties] under Section 107(a) of CERCLA, which liability [Petitioners] deny, [Petitioners are] nevertheless entitled to reimbursement of [their] costs of compliance for PCB removal on the basis that this liability at the site is divisible." Petition at 8-9.

By motion and supporting memorandum filed August 7, 2002, the Region seeks dismissal of the Petitions for Reimbursement, without regard to the merits, on the ground that Petitioners have not completed the required action under the UAO. Memorandum in Support of Motion That Petitions for Reimbursement be Dismissed Without Regard to the Petitions' Merits And, in the Alternative, for Additional Time to Respond on the Merits ("Region's Memorandum") at 3-4. According to the Region:

> Simply put, the Petitions are not ripe for review because the actions required by the UAO are not complete. The groundwater remedy is in a trial shutdown and continued monitoring and maintenance of the system is required by the UAO and the approved monitoring plan in order to determine whether the remedy is effective and can be terminated. In addition to completion of the groundwater remedy, the Petitioners have not installed a soil cover over the soil flushing area as required by the UAO. Finally, the Petitioners have not followed the closure procedures in the UAO, including submission of a Notification of Completion and a final remedial action report.

Id.

In their response to the Region's motion to dismiss, Petitioners argue that they have met all prerequisites for filing a petition for reimbursement under the Act. In particular, Petitioners assert that: (1) pursuant to EAB and federal court precedent, the Petition is ripe for

review; (2) using applicable EPA Guidance for determining when a site is eligible for deletion from the NPL, Petitioners have completed the required actions; and (3) it is arbitrary and capricious for EPA to conclude that the required actions have not been completed in the present case. *See* The Sherwin-Williams Company's Brief in Opposition to U.S. EPA's Motion That Petitions for Reimbursement be Dismissed Without Regard to Merits ("Petitioners' Opposition") at 2, 7, 9.

II. *DISCUSSION*

CERCLA section 106(b)(2)(A), 42 U.S.C. § 9606(b), provides, in part, as follows:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

A petitioner, therefore, must meet certain statutory prerequisites for obtaining review on the merits of a petition for reimbursement, including completion of the "required action." *See Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995). Neither party disputes that completion is a prerequisite to obtaining review. The central issue in the present case is whether the "required action," that is, the actions required by the UAO, had been completed at the time the Petitions for Reimbursement were filed. If not, the Petitions are premature. *See In re CoZinco, Inc.*, CERCLA § 106(b) Petition No. 95-2 (EAB, Sept. 11, 1995) (Order Dismissing Petition) (dismissing petition for reimbursement as premature where petitioner failed to complete the required action).

Under the UAO, Petitioners are required, among other things, to monitor groundwater until such time as analysis consistently indicates that cleanup objectives have been met. *See* UAO at 6; ROD at 25 (P.Ex. 1). As stated, the Monitoring Plan and QAPP projected that sufficient data should be available by the end of 2005 to support the

conclusion that cleanup objectives have been met. *See* Monitoring Plan at 11-12; QAPP at 16. At that time, and providing that the monitoring data otherwise supported the cleanup objectives, final closure activities would be undertaken, including the installation of a six-inch vegetative cover over the part of the Site for which soil flushing was required. A Final Closeout Report would then be submitted in late 2006. QAPP at 16.

It is undisputed that, as of the time the Petitions were filed, several of the actions required by the UAO had not been finished. Specifically, the monitoring work under the UAO had not run its projected course, and the final vegetative cover had not been installed. Petitioners nonetheless argue that we should regard the remedy as "complete" for purposes of reimbursement under Section 106 of CERCLA, pointing to certain EPA guidance as well as prior Environmental Appeals Board and federal court decisions regarding when an action is "complete." Petitioners' Opposition at 3, 7. As discussed more fully below, we find no basis for concluding that the work undertaken by Petitioners to date – work that plainly falls short of satisfying all of the requirements of the UAO, as expounded upon by the Monitoring Plan and other portions of the QAPP – has served to "complete" the actions required by the UAO.

As a preliminary matter, we are struck by the fact that, although both the UAO and the Monitoring Plan incorporated into the UAO provide termination mechanisms by which Petitioners might have sought to earlier conclude their work under the UAO, Petitioners made no attempt to invoke those procedures prior to filing their petitions for reimbursement. We find telling in this regard that Petitioners' contractor itself projected that it would be late 2005 before enough data had been generated during the trial shutdown period to support the conclusion that no further groundwater remediation or soil flushing was required. *See* QAPP at 16. In view of this projection, it is not surprising that Petitioners did not attempt to make a case under the termination mechanisms for earlier conclusion of activities under the UAO. Having failed to avail themselves of the mechanisms in the UAO and Monitoring Plan that might have allowed the work to be completed in its entirety, it

is awkward at best for Petitioners to now argue that the work is nonetheless "complete" for purposes of CERCLA reimbursement.[7]

Indeed, in the absence of completing the work in its entirety, the only basis upon which we could rule that the Petitions are timely is to

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[7] We note, as quoted above, that CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A), requires that a petition for reimbursement be filed within 60 days after completion of the required action. Generally, this 60-day period will commence on the date EPA confirms that the required actions have been completed. *See, e.g., In re Solutia, Inc.*, CERCLA 106(b) Petition No. 00-1, slip op. at 11 (EAB, Nov. 6, 2001), 10 E.A.D. ___ (Region issued Notice of Completion); *In re A&W Smelters & Refiners, Inc.*, 6 E.A.D. 302, 309 (EAB 1996) (Region acknowledged completion of work required), *aff'd*, 962 F. Supp. 1232 (N.D. Cal. 1997), *aff'd in part & rev'd in part on other grounds*, 146 F.3d 1107 (9th Cir. 1998); *In re ASARCO Inc.*, 6 E.A.D. 410, 419 (EAB 1996) (Region sent Petitioners a letter stating that work required by the UAO had been completed); *cf. In re Micronutrients Int'l., Inc.*, 6 E.A.D. 352, 357-59 (EAB 1996) (equating "completion of the required action" with submission of the Notice of Completion where the Region failed to provide reasonable notice to petitioner as to when actions could be considered complete).

In the present case, however, Petitioners have not filed their petitions within 60 days of submitting a Notice of Completion, or within 60 days of any action on the Region's part indicating that the requirements by the UAO had been completed. Rather, the event that Petitioners assert started the 60-day period was the April 25, 2002 dismissal of a complaint filed by the United States in the United States District Court for the Central District of Illinois. In that complaint, filed on February 29, 2002, the U.S. sought, *inter alia*, a civil penalty under CERCLA § 106(b) for Petitioners' alleged failure to comply with the UAO. *See* Complaint, P.Ex. 4. On April 25, 2002, the District Court dismissed this claim pursuant to the parties' joint motion to dismiss. P.Ex. 5. By stipulation, the United States agreed not to bring any future enforcement action for any alleged non-compliance with the UAO arising prior to April 2002, but reserved all other claims for non-compliance that might arise after that date. *Id*. According to Petitioners, this demonstrates that Petitioners were in full compliance with the UAO. *See* Petition at 3.

Because nothing in the Court's April 26, 2002 dismissal of the complaint, nor in the stipulations accompanying the joint motion to dismiss, indicated that the required actions under the UAO had been completed, it would appear that the April 25, 2002 dismissal was not an appropriate point at which to start the 60-day time period for filing a petition for reimbursement under CERCLA § 106(b)(2)(A). This adds further support for the Board's conclusion that the petitions in the present case were prematurely filed.

either find that the work at the Site can be bifurcated between the work that has been done and that which has not, or to find that the work is complete *enough* to satisfy the statutory requirement of completion.

We find no basis for bifurcation in the case before us, and, indeed, Petitioners do not attempt to make out a serious case for it. While the case law recognizes some circumstances in which a remedy might be bifurcated for purposes of CERCLA reimbursement, those circumstances have been limited to situations in which there have been successive UAOs or substantial modifications to the originally issued UAO in a way that alters the nature of the work required by the UAO. *See, e.g., In re CoZinco, Inc.,* 7 E.A.D. 708 (EAB 1998), *appeal docketed*, No. 98-1724 (D. Colo. Aug. 10, 1998). We are aware of no authority, and Petitioners point us to none, which would augur in favor of bifurcation in a case like this one involving a single UAO which has neither been significantly modified nor extended by subsequent Agency directives.

Petitioners' principal arguments fall more neatly into the second line of potential argument in a case like this one – that the work, while not altogether finished, was complete enough to qualify for CERCLA reimbursement. Petitioners point to two sources of authority – an EPA guidance document and caselaw – as support for their "substantial completeness" argument. We address them in turn below. Following this discussion, we will address Petitioners' remaining argument that we should reject the Region's conclusion that the work under the UAO is not yet complete as arbitrary and capricious.

A. *EAB and Court Precedent*

It bears mention at the outset that the statute itself is not terribly helpful to Petitioners' argument. Nowhere on the face of the statute, or for that matter in its legislative history, can reference be found to "substantial" completeness. Rather, the statute uses, in unqualified form, the term "completion," which, standing alone, is a term with fairly

absolute meaning.[8] This being said, and although it is not clear that a court has ever actually applied the concept, there is some discussion in the case law of the concept of "substantial compliance" with CERCLA cleanup orders.

While discussing the concept of substantial compliance only in dicta, the leading case in this area is the Seventh Circuit's decision in *Employers Ins. of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995).[9] In *Wausau*, the court, although ultimately finding that the party seeking reimbursement in that case had not, in fact, completed the action required by the UAO, discussed at some length the kinds of circumstances in which something less than total completion of work under a UAO might nonetheless be sufficient for purposes of seeking reimbursement under Section 106(b). Of particular concern to the court were circumstances in which "the agency takes steps to postpone completion, making it impossible for the party to argue that it had completed the action required of it by the agency," *id.* at 662; where the Agency unreasonably refuses to certify completion, *id.*; "where the party cannot complete the required action for reasons beyond its control," *id.* at 663; or where the Agency issues "unreasonably, oppressively broad orders [i.e., orders that include requirements far removed from the environmental problem for which the PRP is arguably responsible]." *Id.* at 664. In such circumstances, the

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[8] The term "complete" is defined, in part, as "possessing *all* necessary parts, items, components, or elements; * * *." The term "to complete" is defined, in part, as "to make whole, entire, or perfect: end after satisfying *all* demands or requirements * * *." Webster's Third New International Dictionary 465 (1993) (emphasis added).

[9] In *Wausau*, as here, the party seeking reimbursement completed only part of the action required by the UAO, and then sought reimbursement under CERCLA § 106(b). At issue was a UAO requiring Wausau to remediate contamination at a facility to which its insured had sent PCBs and whether Wausau had "completed" work under that UAO. As required by the UAO, Wausau had cleaned up PCB contamination at the Site, but not other contamination required by the UAO. Wausau then sought reimbursement from the fund. EPA denied reimbursement because Wausau had not complied with the UAO which required cleanup of all wastes. As discussed, the court ultimately affirmed the district court's decision denying the petition for reimbursement because Petitioners had not completed the required action.

Seventh Circuit surmised that common law doctrines such as impossibility, impracticability, and frustration might be drawn on to allow for substantial compliance "when to require more would be unreasonable * * * ." *Id.* at 663.

We do not necessarily disagree with the notion advanced by the Seventh Circuit that there may be circumstances along the lines of those catalogued in *Wausau* in which something less than complete satisfaction of Agency demands might be sufficient for purposes of CERCLA reimbursement.[10] What is clear, however, is that the case before us does not present any such circumstances. Here, there is no colorable basis for Petitioners to claim "impossibility," "impracticability," or "frustration." Here, there is no indication that EPA framed the UAO in an oppressively overbroad manner, or, subsequent to its issuance, engaged in actions which served to indefinitely and inappropriately postpone completion. Rather, the UAO outlined a series of discrete remedial steps, none of which were subsequently materially altered or extended by the Agency, which were at the time of issuance projected to take approximately 15 years to complete – a schedule that appears, based in part on Petitioners' own Monitoring Plan and QAPP, to have realistically apprehended the amount of time necessary to do the work. That work, while perhaps nearly complete, has several steps remaining – steps which have been in plain view since the issuance of the UAO. Under these circumstances, we see no basis for application of a substantial compliance theory of the ilk discussed in dicta in *Wausau.*

We likewise see nothing in the Board's precedent that would support such a theory in this case, notwithstanding Petitioners' assertion

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[10] In this regard, we note that in a concurring opinion in *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 721 (EAB 1995), Judge McCallum stated, in part:

> [T]he Agency will also have to keep open the issue of whether substantial but less than punctilious completion of a cleanup project nevertheless justifies considering the merits of a cost recovery petition. That also does not appear to be the case with Findley's noncompliance, which, as just noted, is significant, not merely less than punctilious.

that "using this Board's interpretations of when an action is complete, [the petition] is ripe for review on its merits." Petitioners' Opposition at 7. Petitioners cite to one EAB case in support of this assertion: *In re CoZinco,* 7 E.A.D. 708 (EAB 1998). According to Petitioners, that case stands for the proposition that required action under a UAO is complete when implementation of the remedial action is complete, and when the most substantial actions required by the UAO have been completed. Petitioners' Opposition at 7 (citing *CoZinco*, 7 E.A.D. at 735 n.24 and 737 n.26). Petitioners argue that they satisfy these criteria, and state that "the fact that certain insubstantial tasks specified in the Statement of Work are not finished should 'not persuade' the Board that [Petitioners] 'should be deprived of their right to seek reimbursement' under the [UAO]." *Id*. at 8 (quoting *CoZinco*, 7 E.A.D. at 738 n.26).

The relevant question before the Board in *CoZinco* was distinct from the one at issue here. In *CoZinco*, the Board addressed the question of when the "required action" could be deemed "complete" "such that a petition for reimbursement may be ripe notwithstanding the pendency of *a related order* requiring cleanup activity." *CoZinco*, 7 E.A.D. at 732 (emphasis added). As the Board explained, the issue addressed in that case was:

> [H]ow "completion of the required action" should be interpreted when an "amendment" to a UAO relates to the same general purpose as the original UAO * * *, but the amendment deletes the original SOW, and imposes a new SOW containing different requirements based on different evidentiary predicates.

Id. at 734.

By contrast, the present case does not involve a situation in which the Region has attempted to "amend" a UAO or issue multiple UOAs. Rather, the issue here is whether a single UAO can be divided into separate tasks, such that completion of one set of tasks would allow for consideration of a petition for reimbursement even though the remaining tasks have yet to be completed. As we have already said, we

see no basis for bifurcation of a UAO in such circumstances. *CoZinco* lends no support to Petitioners' position in this regard.[11]

B. *EPA Guidance*

In support of their argument that the required action has been completed in this case, Petitioners further rely on a January 3, 2000 EPA guidance document detailing when a site is eligible for deletion from the NPL. The document, titled "Close Out Procedures for National Priorities List" ("Guidance"), states that it is designed primarily for EPA's Remedial Project Managers and "provides detailed information on achieving the various milestones of the NPL closeout process, highlighting specific activities and the related reports that indicate each activity's completion." Guidance ¶ 1.2 (provided as an attachment to Petitioners' Opposition). These milestones include remedial action completion, construction completion, site completion, and site deletion. *Id*. The Guidance states further that only when site completion has been achieved, will a site be eligible for NPL deletion. *Id*. "Site completion means that the response actions at the site were successful and no further Superfund response is required to protect human health and the environment." *Id*. ¶ 4.0.

While Petitioners describe this Guidance as "applicable," they provide no explanation as to why we should consider it as controlling in the present context. Based on our reading, the Guidance appears to be designed primarily to assist Remedial Project Managers in determining when a site is eligible for deletion from the NPL; it offers relatively little additional guidance for resolving the question presented here -- when has

[11] Indeed, an earlier decision by the Board in *CoZinco* cuts against Petitioners' argument. As stated in *CoZinco*, the Board had previously dismissed one of the petitions as premature where the petitioners had failed to complete the action required. *CoZinco,* 7 E.A.D. at 724-25. In that earlier decision, the Board rejected an attempt to bifurcate a single UAO for purposes of determining completion. *See In re CoZinco, Inc.*, CERCLA § 106(b) Petition No. 95-2 (EAB, Sept. 11, 1995) (Order Dismissing Petition) (dismissing petition for reimbursement as premature where petitioner failed to complete the required action and rejecting argument that "a single order can be bifurcated into separate tasks for reimbursement purposes.").

a potentially responsible party completed the required action for purposes of reimbursement under CERCLA § 106(b)? Moreover, as explained below, with respect to the aspects of the Guidance that do relate to this question, we find no meaningful support for Petitioners' argument that the actions required by the UAO have been completed.

As stated above, the groundwater collection and treatment system required by the UAO in this case is now in a trial shutdown phase. This involves a shutdown of the groundwater recovery and treatment system, followed by confirmatory monitoring and sampling. During this phase, Petitioners must continue monitoring in order to "assess changes in the aquifer conditions during and after the remedial activities, and to evaluate the effectiveness of the groundwater collection system." ROD at 16 (P.Ex. 1). If monitoring data indicate that substantial contamination remains, Petitioners might be required to re-start the recovery and treatment system. *See* Monitoring Plan at 20.[12] Only after Petitioners successfully demonstrate that cleanup goals have been maintained during the trial shutdown can they petition the Region to allow all operations at the Site to cease. *Id*. at 19. At this point, the UAO requires as a culminating step the installation of a vegetative cap over the portion of the Site for which soil flushing had been needed. Thus, groundwater monitoring and the final capping requirement are integrally related to the groundwater remedy.

Under these circumstances, even if the Guidance was applicable, which it is not, the "site completion" criteria referenced in the Guidance have not been satisfied. According to the Guidance, "site completion" requires the successful completion of all response actions and verification that no further superfund response is necessary. Such verification takes the form of a Final Close Out Report ("FCOR"). Guidance ¶ 4.0. Among the requirements of the FCOR, is a section titled "Monitoring Results," which must include "sufficient data to demonstrate cleanup levels specified in the ROD * * * are achieved and implemented and

[12] The approved monitoring plan specifies the number of wells and contaminants that must be monitored, as well as the frequency of sampling. R.Ex. 4 at 11-15.

remedies are performing to design specifications." *Id*. ¶ 4.3. The FCOR must also include a section on "Protectiveness," containing "[a]ssuranc[es] that the implemented remedy * * * achieves the degree of cleanup or protection specified in the ROD(s) for all pathways of exposure and that no further Superfund response is needed to protect human health and the environment." *Id*. The Guidance specifically states that "[i]f monitoring to determine the need for a future response action is ongoing at a site, [site] deletion is premature. In this situation, it is impossible to know whether a site satisfies the NCP's deletion standard - 'no further response is appropriate.'" Guidance ¶ 5.1.

Because in the case at hand monitoring to determine whether contaminants will remain at acceptable levels when the recovery and treatment system is not operating is ongoing and, based on Petitioners' own proposal, will need to continue until at least 2005, and because, in any case, Petitioners have not yet complied with the requirement in the UAO to install a vegetative cover, Petitioners have not even satisfied the requirements for site completion as specified in the Guidance. Petitioners' arguments in this regard are therefore rejected.[13]

C. *Failure to Find Completion is Arbitrary and Capricious*

Finally, Petitioners argue that it is arbitrary and capricious for EPA to conclude that the required actions have not been completed in the present case. *See* Petitioners' Opposition at 9-13. In particular, Petitioners argue that all ground water analyses to date have indicated that groundwater objectives have been achieved, and that Petitioners should not be required to continue monitoring indefinitely before they can seek reimbursement. *Id*. at 9-10. According to Petitioners, "[t]aking USEPA's argument to its logical extreme would leave all potentially responsible parties without any right to petition for reimbursement for up to thirty years." *Id*. Petitioners further state that the Region's interpretation of what completion in this case would allow it to

[13] As previously stated, we do not, in any event, consider the Guidance controlling in this circumstance.

"manipulate the completion date * * * into infinity, so long as it suits the Agency's purpose." *Id*. at 13. We disagree.

Significantly, there is no evidence in this record that the worst case scenarios to which Petitioners point are manifest here. There is no evidence that Petitioners will be deprived of the opportunity to seek reimbursement for an extended period of time, or that the Region is manipulating the completion date to extend indefinitely the life of the UAO. Rather, the record suggests that the Region is simply adhering to the course of action established by the original UAO – a course of action that, while nearing conclusion,[14] has several important remaining elements. Specifically, the UAO requires that Petitioners monitor water-quality until monitoring results consistently indicate that compliance with ground water clean-up objectives, which, according to Petitioners' own projections, will extend into 2005, with a Final Closeout Report submitted in late 2006. *See* QAPP at 16. The UAO then calls for the installation of a vegetative cap. *See* ROD at 24.

We note here again the awkwardness of Petitioners' argument that the Region has arbitrarily and capriciously found the work under the UAO incomplete, in view of Petitioners' failure to have invoked the termination mechanisms under the UAO and Monitoring Plan. Indeed, it is not at all clear from the record that, prior to filing their petitions for reimbursement, Petitioners even requested a completeness determination from the Region – they certainly did not follow the procedures set out in UAO and Monitoring Plan for so doing. Moreover, having failed to invoke those procedures, it is far from clear that Petitioners developed a record upon which the Region could have concluded that the work is complete. Questioning the soundness of the Region's "decision" under such circumstances seems strained at best.

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[14] According to plans prepared by Haag Environmental Company, contractor for Petitioners, monitoring will continue through 2006, at which time a Final Closure Report will be prepared. *See* R.Ex. 5 (Approval of the Second Revision Quality Assurance Project Plan Amendment) (Sept. 12, 2001) at 16. The Region appears to agree with Petitioners that completion of the groundwater activities required by the UAO is likely by September of 2006. *See* Region's Memorandum at 9.

In any case, as discussed above, we agree with the Region that the required actions have not been completed. *See In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 717-18 (EAB 1995) (holding that obligations under a UAO were not complete as long as additional analysis was proceeding and future remediation remained a possibility). Thus, we do not find the Region's decision making process on this point arbitrary and capricious.

III. *CONCLUSION*

For the reasons discussed above, we find that Petitioners had not completed the response action required by the UAO at the time the Petitions were submitted. Because completion of the response action is a statutory prerequisite to the filing of a petition for reimbursement under CERCLA § 106(b)(2), the petitions are premature and are, therefore, dismissed without prejudice.

So Ordered.[15]

[15] When issuing an order resolving a petition for reimbursement, the Board will ordinarily issue a preliminary decision and allow the parties to comment before issuing a final decision. *See* Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions at 8 (Oct. 9, 1996). However, because today's order does not involve a final disposition, but a dismissal without prejudice to refile, the Board is not issuing a preliminary decision.